GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16451 of Waste Management of Maryland, Inc., pursuant to 11 DCMR §§ 3105 and 3106, from the administrative decision of the Zoning Administrator to deny the owner, under Certificate of Occupancy Application No. 511823, the right to use the premises for a "carting or hauling terminal or yard, or a processing establishment, specifically a solid waste handling facility that will be used for the receipt, loading, compacting and transfer for disposal outside the District of Columbia of municipal solid waste and/or construction and demolition debris (all materials non-hazardous)," which is a permitted use in a C-M-2 District at premises 2160 Queens Chapel Road, N.E. (Square 4259, Parcels 154/72, 154/87, 154/110, 154/112 and Lot 3).

Appeal No. 16452 of Waste Management of Maryland, Inc., pursuant to 11 DCMR §§ 3105 and 3106, from the administrative decision of the Zoning Administrator to deny the owner, under Certificate of Occupancy Application No. 511823, the right to continue to use the premises for light manufacturing, processing, fabricating, and warehousing of steel products, office and retail construction and industrial supplies (all materials non-hazardous) except to transfer the name of the business, the nature of the business to remain the same, which is a permitted use in a C-M-2 District (all materials non-hazardous) at premises 2160 Queens Chapel Road, N.E. (Square 4259, Parcels 154/72, 154/87, 154/110, 154/112 and Lot 3).

HEARING DATES: **July 7, 1999 and September 22, 1999**
DECISION DATE: **November 3, 1999**

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

On February 12, 1999, Waste Management of Maryland, Inc. ("Waste Management" or "Appellant") filed two appeals and an application for a special exception with the Board of Zoning Adjustment ("Board" or "BZA"). The appeals challenge administrative decisions made February 21, 1996 by the Zoning Administrator to deny two applications by Waste Management for a Certificate of Occupancy ("C of O") for the property at 2160 Queens Chapel Road, N.E. The special exception application requests relief to establish a solid waste handling facility at the property, pursuant to 11 DCMR § 802.4 (BZA Application No. 16453). At the hearing on July 7, 1999, the Board granted Waste Management's motion to defer consideration of the special exception application until after the appeals were decided.

George Galish and his company, Auto Body Supply, Inc. (collectively, "Galish"), moved to intervene in opposition to the appeals and special exception application. Auto Body Supply, Inc. is located at 2215 Adams Place, N.E., directly across the street from the subject property.

The Board granted the motion to intervene. By letters dated September 22, 1999, Mr. Galish withdrew as intervenor and submitted a statement in support of Waste Management's appeals.

On September 21, 1999, Custom Machinery Company, Inc. also moved to intervene in these matters. Custom Machinery Company owns property at 2230 Adams Place, N.E., adjacent to and within 200 feet of the subject property, where it conducts its business of sales, warehousing, distribution, and consulting with regard to the repair of laundry and dry cleaning equipment. The Board granted Custom Machinery Company's motion to intervene.

James Shulman, on behalf of Citizens Against Trash Transfer Stations, requested party status. Because the organization has no specific interest that would be affected by these appeals, the Board denied party status.

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA" or "Government"), the government agency that includes the office of the Zoning Administrator, was accorded party status pursuant to 11 DCMR § 3399.1.[1] On July 6, 1999, the Government requested a continuance, citing a delay in receiving notice of the scheduled hearing. The motion was opposed by Waste Management and Intervenor Galish, but was granted by the Board, which set a new hearing date of September 22, 1999.

On August 12, 1999, the Government submitted a motion to dismiss the appeals as untimely. The motion was opposed by Waste Management, and the Board decided to take it under advisement until after the appeals had been heard. On September 21, 1999, Custom Machinery Company also filed a motion to dismiss, joining and incorporating by reference the motion to dismiss submitted by the Government.

The appeals were heard on September 22, 1999. Testimony was received from the Appellant, the Government, and Custom Machinery Company.

On October 21, 1999, Waste Management filed a motion to strike the Proposed Findings of Fact, Conclusions of Law, and Order submitted by the Government on October 14, 1999. In its motion, Waste Management alleges that the Government's filing presented substantive new legal arguments after the close of the record, in contravention of 11 DCMR § 3326.8. According to Waste Management, any proposed orders submitted to the Board after the close of the record may not include any new evidence or legal argument. The Government filed its opposition on November 2, 1999, and on November 8, 1999, Intervenor Custom Machinery Company joined with the Government's memorandum in opposition to Waste Management's motion to strike.

Finally, on November 30, 1999, Waste Management filed a motion for clarification. The Appellant asserts that the Board "apparently decided that it would . . . rule on the merits of the case at its meeting scheduled for December 1, 1999." Waste Management contends that the Board lacked jurisdiction to reach the merits of the appeals in light of its earlier orally announced decision to dismiss the appeals as untimely.

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[1] On October 1, 1999, the Rules of Practice and Procedure for the Board of Zoning Adjustment were recodified under Chapter 31 of Title 11 of the District of Columbia Municipal Regulations. This Order refers to sections of Chapters 31 and 33, Title 11, in effect at the time the appeals were filed.

FINDINGS OF FACT:

1. The subject property is approximately 2.3 acres located at 2160 Queens Chapel Road, N.E., near the intersection of Queens Chapel Road and Adams Place, N.E. in Ward 5 (Square 4259, Lot 3 and Parcels 154/72, 154/87, 154/110, and 154/112). The property is zoned C-M-2.

2. The property is owned by Caslin Associates, L.P. and is used as a solid waste handling facility, operated by Waste Management, pursuant to an interim operating permit issued by DCRA on August 2, 1996 in accordance with the Solid Waste Handling Facility Act of 1995 (D.C. Code § 6-3451 *et seq.*). Issuance of the interim permit was conditioned on Caslin Associates' obtaining a C of O that described the use of the subject property as a "solid waste handling facility."

3. The property is improved with three one-story buildings: the "tipping" building where solid waste is "tipped" from smaller garbage trucks onto the concrete floor for transfer to larger trucks; a garage building; and a storage building. Two truck scales are also located on the property.

4. Solid waste handling involves the aggregation of individual loads of solid waste, collected by short-haul collection trucks from residential, commercial, or industrial neighborhoods, into larger loads to be hauled to a final disposal site.

5. Waste Management currently handles approximately 16,000 tons of commercial waste per month at the property. Private haulers enter from the east on Queens Chapel Road, line up on the site to be weighed, then enter the main building and "tip" their loads onto the tipping floor, and finally exit the site southbound onto Queens Chapel Road. The solid waste is transferred from the tipping floor into larger transfer trucks, which enter the property from Adams Place, for transfer to a permanent disposal site.

6. On November 21, 1995, Waste Management filed an application for a certificate of occupancy (Application No. 511823, known as the "processing application") with respect to the use of the property as a "carting or hauling terminal or yard, or processing establishment, specifically a solid waste handling facility for receipt, loading, compacting and transfer for final disposal outside of the District of Columbia of solid waste and/or construction and demolition debris (all materials non-hazardous)."

7. By letter dated February 21, 1996, the Zoning Administrator denied the processing application and directed Waste Management to seek a variance from the Board pursuant to 11 DCMR §§ 801 and 3107. The letter stated that "the operation of a solid waste facility is not allowed as a matter of right in a C-M District," citing 11 DCMR § 800.6, which provides that any use specifically prohibited in an M district is not permitted in a C-M district. The letter stated further that:

> Because 11 DCMR § 823.1 specifically prohibits, among other things, slaughterhouses, animal rendering facilities, oil refineries, bone products manufacturing, the curing, tanning or storage of hides, fertilizer manufacturing, and "other uses with objectionable characteristics similar to those listed," in M

> districts, there is a legitimate question as to whether the "carting", "hauling" and "processing" of solid waste has similarly objectionable characteristics, and as such would be banned from CM districts. Whether [Waste Management's] operation is similarly objectionable to prohibited uses is a decision that should be made by the BZA. Furthermore, because there is no specific zoning category for solid waste handling facilities, [Waste Management's] application must have BZA approval through the variance process.

Letter from Gladys Hicks, Acting Zoning Administrator, to Andrew Mishkin, counsel for Waste Management, dated February 21, 1996, page 3. [Statement of Applicant, Exhibit F.]

8. Also on November 21, 1995, Waste Management filed an application requesting reissuance, in Waste Management's name, of a C of O held by Mike Perkins, the previous owner of the property (Application No. 511824, known as the "name change application").

9. Certificate of Occupancy No. B168010 was issued to Mike Perkins on March 21, 1994 authorizing use of the subject property for "light manufacturing, processing, fabricating, and warehousing of steel products and office and retail construction industrial supplies (all materials non-hazardous)."

10. The Zoning Administrator letter of February 21, 1996 referenced in Paragraph 7 above also denied the name change application on grounds that the Board had recently revoked the Perkins' C of O[2] and consequently there was no certificate to reissue in Waste Management's name.[3]

CONCLUSIONS OF LAW AND OPINION:

An appeal to the Board may be taken by any person aggrieved by any decision of DCRA granting a building permit, or any other administrative decision based on the Zoning Regulations. D.C. Code § 5-424; 11 DCMR § 3200.2. The Board's powers with regard to appeals include the power to decide allegations of error in any decision made by DCRA in carrying out or enforcement of any zoning regulation. D.C. Code § 5-424.

The Zoning Regulations provide that an appeal to the Board must be "timely." 11 DCMR § 3315.2. The question of timeliness is jurisdictional; if an appeal was not timely filed, the Board is without power to consider it. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). Because the Board's rules do not adopt a specific time limit on appeals, a standard of reasonableness is applicable to determine whether an appeal is timely. *Id.* In applying the reasonableness standard, courts have consistently held that the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of. *Woodley Park Community Association v. District of Columbia Board of*

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[2] *See* BZA Appeal No. 16041 (December 12, 1995). In that case, the Board upheld DCRA's decision to revoke the C of O held by Perkins for failure to use the property in compliance with the permit.

[3] Revocation of the C of O was contested by Perkins and is the subject of a pending appeal before the District of Columbia Court of Appeals (Nos. 96-AA-30 and 97-AA-772).

Zoning Adjustment, 490 A.2d 628, 636 (D.C. 1985). *See also, e.g., Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994).

This case concerns appeals of two decisions of the Zoning Administrator denying two C of O applications for the subject property. Both applications were denied by the Zoning Administrator by letter to counsel for Waste Management dated February 21, 1996. Waste Management appealed both decisions to the Board on February 12, 1999 – almost three full years later. The Board concurs with the Government that Waste Management was "chargeable with notice or had knowledge of the decision complained of" starting February 21, 1996, the date of the Zoning Administrator's letter, and that any appeal of those decisions should have been filed within a reasonable period thereafter. It is not reasonable to file an appeal of a decision of the Zoning Administrator three years after the appellant had notice of the written decision. *See, e.g., Woodley Park Community Association*, 490 A.2d at 637 (D.C. 1985) (one-year delay from issuance of building permit to filing of appeal relating to height, setback, and use was not reasonable).

Waste Management argues that the reasonableness test must take into account whether an appellant was pursuing other administrative remedies or instead was "sleeping on its rights" by taking no action at all. The Appellant states that Waste Management "was vigorously pursuing" administrative solutions by seeking issuance of a C of O during the three years before the appeals were filed, and, citing *Goto*, contends that the delay therefore cannot count against it in determining the timeliness of the appeals.

The Board rejects this argument as without merit. A long interval, such as three years, does not become reasonable merely because an appellant initially chooses to pursue other options instead of preserving its appeal rights by filing a timely appeal. In *Goto*, the court upheld the BZA's determination that an appeal was timely because it was filed two months after the issuance of a written decision by the Zoning Administrator, even though the appellants in that case had oral notice of the decision six months earlier. In an inquiry separate from the issue of timeliness, the court also considered whether the appeal in *Goto* was barred by laches. 423 A.2d 917, 925. The court looked to the record as to the timing of the appeal to determine whether there was any unreasonable delay, and concluded – with respect to laches, not timeliness – that a seven-month delay in filing the appeal was reasonable when, during that period, the appellants were working within the administrative process to attempt to prevent construction of the property at issue.

The Board here concludes that time spent pursuing administrative solutions does not excuse a lengthy delay – especially a delay of three years – in filing an appeal of a decision by the Zoning Administrator. *See also Woodley Park*, 490 A.2d at 638 (court rejected appellant's contention that intervenor property owner's conduct during negotiations, after building permit was issued, rendered its appeal timely; appellant was responsible for its choices and could not escape harsh consequences of its one-year delay in filing an appeal merely because intervenor – its adversary in difficult negotiations – was less than fully candid.) Nor is the Board persuaded by cases from other jurisdictions cited by the Appellant. *See Morris v. Borough of Haledon*, 93 A.2d 781 (N.J. Super. Ct. App. Div. 1952) (individual plaintiff can bring action to enjoin businesses operating in residential district in violation of zoning ordinance); and *Larkin v.*

Tsavaris, 85 So.2d 731 (Fla. 1956) (suit between owners of neighboring property, alleging zoning violations by defendant, was not barred by laches where plaintiff acted with all due diligence after discovering facts upon which suit was brought).

Because the appeals are untimely, the Board concludes that Waste Management's motion to strike and its motion for clarification are moot. Both motions are therefore denied as moot. *See* 11 DCMR § 3100.9.

The motion to **DISMISS** the Appeals as untimely is **GRANTED.** Therefore, it is hereby **ORDERED** that the Appeals are **DISMISSED.**

VOTE: 5-0 (Sheila Cross Reid, Betty King, Robert Sockwell, Anthony Hood, and Jerry Gilreath to grant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
JERRILY R. KRESS
DIRECTOR

FINAL DATE OF ORDER: MAY 22 2000

UNDER 11 DCMR 3103.1 "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

Appeal No. 16451
Appeal No. 16452

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPEAL NOS.: 16451 AND 16452

As Director of the Office of Zoning, I certify and attest that on MAY 22 2000 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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Attested by: Jerrily R. Kress
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Director